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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/633,965	08/04/2003	Paul Alfred Cimiluca	9152R	5180

27752 7590 12/03/2004

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CINCINNATI, OH 45224

EXAMINER

WHITE, EVERETT NMN

ART UNIT	PAPER NUMBER
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1623

DATE MAILED: 12/03/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

**Application No.**

10/633,965

**Applicant(s)**

CIMILUCA ET AL.

**Examiner**

EVERETT WHITE

**Art Unit**

1623

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 03 September 2004.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-43 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-43 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- ☐ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date October 13, 2004.
- ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- ☐ Notice of Informal Patent Application (PTO-152)
- ☐ Other: \_\_\_\_\_.

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### **DETAILED ACTION**

1. The amendment filed September 3, 2004 has been received, entered and carefully considered. The amendment affects the instant application accordingly:

- (A) Comments regarding Office Action have been provided drawn to:
- (i) 101 double patenting rejection, which has been withdrawn;
  - (ii) 103(a) rejection, which has been maintained for the reasons of record.

2. Claims 1-43 are pending in the case.

3. The text of those sections of Title 35, U. S. Code not included in this action can be found in a prior Office action.

### ***Claim Rejections - 35 USC § 103***

4. Claims 1-43 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Nakamura et al (US Patent No. 6,045,847) in view of Marlett et al (US Patent No. 6,287,609) or Colliopoulos (US Patent No. 5,009,916) for the reasons set forth on pages 3 to 6 of the Office Action mailed March 9, 2004.

5. Applicant's arguments filed September 3, 2004 have been fully considered but they are not persuasive. Applicants argue against the rejection on the ground that the Nakamura et al patent does not teach any desirable ratio of xylose to arabinose and does not teach agglomerates of xylose and arabinose having any specific surrounding layers. This argument is not persuasive since the Nakamura et al patent discloses a water-soluble hemicellulose, which is a polysaccharide containing xylose and arabinose. Nakamura et al discloses that the water-soluble hemicellulose may be used in an emulsified state with fat or oil, which is within the scope of the instant claims which set forth agglomerates comprising a polysaccharide component comprising xylose and arabinose, which may be surrounded by a hydrophobic layer (see column 4, 3<sup>rd</sup> paragraph). In the same paragraph, Nakamura et al also teaches that the water-soluble hemicellulose as part of a soaking time-shortening agent for grain preparation may be distributed and sold in emulsified or suspended form with a fat or oil, or in solution form in water, saline or a solution of an organic acid such as acetic acid. The teaching of the

Nakamura et al patent that the hemicellulose may be in solution form in water, saline or a solution of an organic acid such as acetic acid falls within the instant claims when the agglomerate comprising a polysaccharide component comprising xylose and arabinose is surrounded with a hydrophilic layer.

The Nakamura et al patent is combined with the Marlett et al patent to show the ratio of xylose to arabinose being at least about 3:1. The Marlett et al patent discloses psyllium seed husks that can be used as a dietary substance to promote laxation and also as a hypocholesterolemic agent (see abstract). Marlett et al teaches the preparation of fractions obtained from psyllium seed husks that comprised mostly of xylose and arabinose. See column 5, lines 3-6 wherein Marlett et al discloses the ratio of weights of xylose to arabinose of Fraction B as being between 2.5 and 4.5, and between 3.0 and 4.0 in a preferred embodiment, which covers the xylose to arabinose ratio set forth in the instant claims.

Applicants further argue that given the benefits of the polysaccharide fractions described in Marlett et al, it would not have been expected that the artisan would successfully substitute components described in Nakamura or Colliopoulos with components, which contribute to the unpleasant or unsafe qualities of the husk. This argument is not persuasive since the xylose and arabinose are always present in the composition of the Marlett et al patent.

In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, one of ordinary skill in this art would be motivated to combine the teachings of the Nakamura et al, Marlett et al and Colliopoulos patents in a rejection of the claims under 35 U.S.C. 103 since all the patents set forth dietary compositions that comprise xylose and arabinose.

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According, the rejection of Claims 1-43 under 35 U.S.C. 103(a) as being unpatentable over the Nakamura et al patent in view of the Marlett et al patent or the Colliopoulos patent is maintained for the reasons of record.

6. Claim 24 stands rejected under 35 U.S.C. 103(a) as being unpatentable over Nakamura et al and Marlett et al as applied to Claims 1-43 above, and further in view of Barbera (US Patent No. 5,425,945) for the reasons set forth on pages 6 and 7 of the Office Action mailed March 9, 2004.

7. Applicant's arguments filed September 3, 2004 have been fully considered but they are not persuasive. Applicants argue against the rejection on the ground that the use of literature relating to psyllium husk for the successful optimization of xylose and arabinose polysaccharides fractions present problems that have been found with psyllium husk in the past. This argument is not persuasive since the claims as presently written, do not exclude psyllium husk compositions that comprises agglomerates comprising xylose and arabinose, which are surrounded with a hydrophobic or hydrophilic layer. Accordingly, the rejection of Claim 24 under 35 U.S.C. 103(a) as being unpatentable over the Nakamura et al and Marlett et al patents as applied to Claims 1-43 above, and further in view of the Barbera patent is maintained for the reasons of record.

### ***Summary***

8. All the Claims are rejected.

### ***Conclusion***

9. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the

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shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

***Examiner's Telephone Number, Fax Number, and Other Information***

10. For 24 hour access to patent application information 7 days per week, or for filing applications, please visit our website at [www.uspto.gov](http://www.uspto.gov) and click on the button "Patent Electronic Business Center" for more information.

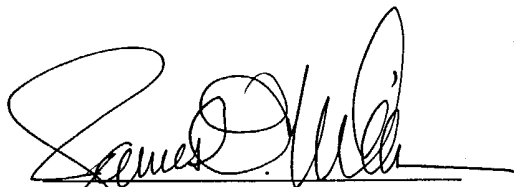
Any inquiry concerning this communication or earlier communications from the examiner should be directed to Everett White whose telephone number is (571) 272-0660. The examiner can normally be reached on Monday-Friday from 9:30 AM to 6:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, James O. Wilson, can be reached on (571) 272-0661. The fax phone number for this Group is (703) 872-9306.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the Group receptionist whose telephone number is (703) 308-1235.

*E. White*

E. White

  
James O. Wilson  
Supervisory Primary Examiner  
Technology Center 1600